6-29-2007

Harger v. Teton Springs Respondent's Brief Dckt. 33532

IN THE SUPREME COURT OF THE STATE OF IDAHO

DONALD and FRANCINE HARGER,

Plaintiff/Respondents-Counter-Defendants/Cross-Appellants,

vs.

TETON SPRINGS GOLF AND CASTING, LLC,

Defendant/Appellant-Counter-Claimant/Cross-Respondent

Supreme Court No. 33532

RESPONDENT'S BRIEF

Appeal from the Order of the
Idaho Seventh Judicial District Court, Teton County

Honorable Brent J. Moss, District Judge presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

Cases

Statutes

I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from an order for new trial upon a jury verdict rendered in a trial of a breach of contract claim.[1] Appellant is Teton Springs Golf & Casting, LLC, owner and developer of the Teton Springs Subdivision and golf resort near Victor, Idaho ("Teton Springs"). Respondents are Donald and Francine Harger (collectively "the Hargers").[2] The Hargers brought this action against Teton Springs for breach of a purchase and sale agreement for the purchase of lot and model cabin located in the Teton Springs Subdivision.

B. Course of Proceedings.

The Hargers filed their complaint on June 17, 2004. R. Vol. I. p. 1-14. By order dated September 2, 2005, the district court granted the Hargers' motion to amend their complaint to add a claim for punitive damages against Teton Springs. R. Vol. I p. 78. The parties filed cross-motions for summary judgment and both motions were denied. R. Vol. I p. 411-508, 715-775. The matter was tried to a jury for 5 days in April, 2006.

At the close of the evidence, the Hargers requested that the jury award the following items of damages in the following amounts based on evidence that was virtually unrefuted at trial:

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[1] The district court order also dismissed all claims against certain additional defendants not named herein. That portion of the district court's order is not at issue on appeal.

[2] The Hargers are residents of Jackson Hole, Wyoming. They are both semi-retired. Tr. p. 35 L. 6 to p. 38 L. 8 (Fran Harger).

1. The difference between the contract price for the completed cabin and its fair market value as of the date of the breach: $348,040;

2. The value of the rebate on the cabin purchase price: $21,000;

3. The loss of value of plaintiffs' discounted golf club membership: $14,000;

4. The value of three (3) weeks free cabin rental for three (3) years: $46,621;

5. The penalty incurred as a result of the failed 1031 property exchange: $22,000.

The total amount of damages claimed by the Hargers was $429,683.00. Tr. p. 863 L. 24 to p. 864 L. 17. By a 9-3 verdict, the jury found that:

(1) a contract existed between the parties as of January 2004;

(2) Teton Springs breached the contract; and

(2) the Hargers' remedy for Teton Springs' breach of the contract was not limited to the return of their $126,940 deposit under the Default provision of the written Lot Sale Agreement. (R. Vol. III p. 1067-1070.)

The jury then awarded the Hargers $178,000 in damages (inclusive of the return of the deposit, for a total net damages award of $51,060). R. Vol. III p. 1067-1070.

The Hargers filed a post-trial motion for additur and/or new trial on the issue of damages pursuant to Idaho Rules of Civil Procedure Rule 59 and *Pierstorff v. Gray's Auto Shop,* 58 Idaho 438, 447, 74 P.2d 171, 175 (1937), on the grounds that the jury arbitrarily or capriciously disregarded the Hargers' unrefuted evidence as to the amount of their damages. R. Vol. III p. 1077 to 1097. Teton Springs opposed the motion. R. Vol. III p. 1142 to 1152.

At the hearing on the Hargers' motion for additur and/or new trial on damages, the district court addressed the following remarks to counsel:

> Folks, I've read all your materials. I'll give you another opportunity – suggestion: Settle this case. I don't know how many times we have to keep going through that. But I think everybody got an idea of what I was trying to tell you early on. I'll make the decision on your request, but I think you have one other opportunity to try to resolve this case without having to go to an appeal.
>
> . . .
>
> I'm saying folks, before I get you a decision in writing that you may have to take your next step on, you still have the option to resolve this case. You know what the jury has done with it. And having said that, both of you, there's some negotiation room there. I think you ought to try to resolve it before you have to spend the next few years appealing the case.
>
> . . .
>
> Having said that, though, that does give you some time to get this thing resolved. And I would really suggest again, you've got an offer, you know what the jury has done, see if you can't get this thing together and put it to rest before I have to give you a decision that both of you may not like again.

Tr. p. 901 L. 7 to p. 904 L. 9.

By order dated July 31, 2006, the district court granted the Hargers a new trial on all issues. R. Vol. III p. 1239 to 1242 (*See* Appendix, Tab 1). In its order, the district court made the following specific findings:

- the evidence at trial could sustain the jury's finding that a contract existed between Teton Springs and the Hargers in January 2004 (Appendix, Tab 1 p. 2-3);
- the evidence at trial could sustain the jury's finding that Teton Springs breached the contract (Appendix, Tab 1 p. 2-3);
- the jury's finding that Teton Springs breached its contract with the Hargers should have entitled Hargers to a minimum of the difference between the reasonable value of the property at the time of the breach ($875,000) and the contract price of approximately $650,000 (Appendix, Tab 1 p. 3);
- the damages awarded by the jury are not consistent with the responses the jury gave on the verdict form and the court cannot reconcile the amount

awarded by the jury in view of the uncontradicted evidence of purchase price and value (Appendix, Tab 1 p. 2, 3);

- the evidence at trial demonstrated a dispute as to the existence of the other contract terms upon which the Hargers base their claim for additional damages (i.e, the rebate, the discounted golf club membership, three weeks free cabin rental for three years, and the penalty on the failed 1031 exchange) (Appendix, Tab 1 p. 3);

- if the court had been the trier of fact in this matter, it would have rendered a verdict in favor of Teton Springs on the grounds that the Hargers breached the contract when they failed to close on the cabin following the issuance of the certificate of occupancy, thus excusing Teton Springs from further performance under the contract

- the court, if it had been the trier of fact, and having determined liability in favor of Teton Springs, would have ordered Teton Springs to return the Hargers' deposit plus interest at the legal rate (Appendix, Tab 1 p. 2); and

- a new trial of this matter could result in a verdict in favor of Teton Springs, in which case the Hargers would be entitled to recover the same amount (i.e. the return of their deposit plus interest) as they have already recovered from the jury upon the verdict in their favor (Appendix, Tab 1, p. 3)

On appeal, Teton Springs seeks to have the court's order for new trial reversed and the court's entry of judgment in favor of the Hargers in the amount of $178,000 reinstated. The Hargers seek to have the court's order for new trial affirmed, and/or in the alternative, to have the order modified to include an additur and/or limit the new trial to the issue of damages only.

C. Statement of Facts.

1. The written agreements.

As of August 30, 2003, the parties had a binding agreement for the purchase and sale of a lot and model cabin in the Teton Springs Subdivision. R. Vol. III p. 1044 (Jury Instruction No.

7). The terms of this agreement were memorialized in the following series of documents, all of which were prepared by Teton Springs:

1. April 19, 2003 Teton Springs Contract for Lot Sale, including three year lease-back model cabin program addendum ("Lot Sale Agreement") (R. Vol. III p. 1267; Trial Exhibit No. 5) (Appendix, Tab 2); see also Tr. p. 513 L. 21 to p. 514 L. 7 (Tony Vest);

2. April 19, 2003 letter from Teton Springs Chief Operating Officer, Bill Reid, to the Hargers confirming that the Hargers are entitled to a $21,000 rebate on the purchase price of their cabin upon closing (R. Vol. III p. 1267; Trial Exhibit No. 6) (Appendix, Tab 3);

3. April 3, 2003 letter from Teton Springs Sales Manager, Jim Gill, to the Hargers confirming that the Hargers are entitled to one year's free golf membership in the event that the Hargers refer another buyer who buys property in the subdivision (R. Vol. III p. 1267; Trial Exhibit No. 4) (Appendix, Tab 4);

4. April 26, 2003 letter from Jim Gill to the Hargers confirming reservation of right to purchase a discounted ($16,000) golf membership and free use of rental cabin for up to three weeks per year during the three year term of lease-back program (R. Vol. III p. 1267; Trial Exhibit No. 11) (Appendix, Tab 5);

5. April 30, 2003 letter from Jim Gill to the Hargers agreeing to consolidate closing of lot and cabin and change in terms of amount and use of earnest money/deposit (R. Vol. III p. 1267; Trial Exhibit No. 12) (Appendix, Tab 6);

6. August 30, 2003 Model Cabin Sale Agreement with initialed changes to price for additional upgrades, acknowledgement of receipt of 20% deposit and purchase of property as part of a Section 1031 exchange (R. Vol. III p. 1267; Trial Exhibit No. 25) (Appendix, Tab 7).

The general outline of the deal between Teton Springs and the Hargers was that the Hargers would purchase a lot and model cabin from Teton Springs, Teton Springs would furnish and lease the model cabin back from the Hargers for $3,000 per month for three years for use in its marketing program for the subdivision, and at the end of the lease-back period, the Hargers would have the option of placing the cabin into Teton Springs' rental program for an additional

three years. Tr. p. 42 L. 8 to p. 44 L. 18 (Fran Harger); Tr. p. 563 L. 15 to p. 564 L. 6 (Tony Vest); Appendix, Tab 2. Under the terms of the rental agreement, Teton Springs guaranteed the Hargers a rental income of $2,000 per month, with any excess split 50/50 between the parties. Tr. p. 44 L. 4 to L. 18 (Fran Harger); Appendix, Tab 2.

Teton Springs sold a total of four model cabins that they built and sold as part of their model cabin marketing package. Tr. p. 146 L. 16-25 (Don Harger); Tr. p. 505 L. 8-15 (Tony Vest). These cabins were sold at a time when sales for Teton Springs were going poorly, and for that reason, Teton Springs offered a number of incentives to buyers who were willing to participate in the model cabin program. Tr. p. 548 L. 14-17; p. 564 L. 3-23 (Tony Vest); Tr. p. 415 L. 13 to p. 416 L. 17 (Jim Gill): Tr. p. 288 L. 6-13; p. 319 L. 19-25; p. 320 L. 1-7 (Bill Reid). Teton Springs also initially under-priced the model cabins, so that by the time construction on the homes was completed, the contract prices on these homes had become extremely favorable to the purchasers. Tr. p. 534 L. 1-6; p. 540 L. 13-20; p. 570 L. 9-14 (Tony Vest); Tr. p. 405 L. 16-25; p. 405 L. 1-5 (Jim Gill): Tr. p. 315 L. 4-25; p. 317 L. 18-25; p. 318 L. 1-25 (Bill Reid). In contrast, the models' under-pricing, in combination with construction delays and cost overruns on the projects, ultimately cause Teton Springs to be in the position where it was losing money on the cabins under the terms of their original sales contracts. Tr. p. 540 L. 13-20; p. 573 L. 4-13 (Tony Vest); Tr. p. 318 L. 1-25; p. 320 L. 8-15 (Bill Reid).

2. Modification of the default/remedies provision.

The Hargers signed their agreement for the purchase of the lot on April 19, 2003, and paid into escrow $21,000 as earnest money on the lot. Appendix, Tab 2. The closing on the lot

was originally scheduled for June 15, 2003. Tr. p. 61 L. 17-18 (Fran Harger). The closing date on the cabin was supposed to occur as soon as construction on the cabin was complete, which Teton Springs anticipated to be sometime in July/August 2003. Tr. p. 61 L. 21-25 (Fran Harger); Tr. p. 286 L. 4-15 (Bill Reid). In order to save on the cost of two closings occurring so closely together, the Hargers requested that the sale of the lot and cabin be combined into a single closing. Tr. p. 65 L. 19 to p. 66 L. 25 (Fran Harger). Teton Springs agreed to this request upon the condition that the Hargers pay directly to Teton Springs (not into escrow) a deposit of 20% of the total purchase price of the lot and cabin (including the original $21,000 earnest money on the lot, to be released from escrow) for use by Teton Springs until the time of closing. Tr. p. 65 L. 19 to p. 66 L. 25 (Fran Harger). The Hargers agreed to pay the $126,940 deposit and instructed the escrow company to release the $21,000 earnest money to Teton Springs as part of that deposit. R. Vol. III p. 1267 (Trial Exhibits 17, 18 and 22) (collectively, Appendix, Tab 8).

The original $21,000 earnest money payment had been subject to the following default provision under the terms of the written Lot Sale Agreement:

> **Default**. If Purchaser fails to perform his or her obligation under this Contract or to close the sale provided herein, Seller may, at its option, elect to enforce this Contract by declaring this Purchase Contract in default and retain any and all Earnest Money as full liquidated damages, in which event the parties will be released from any further obligation or liability to each other. Purchaser and Seller agree that the exact amount of Seller's actual damages would be impossible to calculate and that such liquidated damages are reasonable. In the event that this sale fails to close due to the default on the part of the Seller, or inability of the Seller to deliver "good and marketable fee simple title" to the Lot, then upon written notice from the Purchaser, Seller shall return all Earnest Money, and the parties shall be released from any and all other further obligations hereunder. Neither Purchaser nor Seller shall have any further rights or remedies on account of any default except as stated in this paragraph.

(Appendix, Tab 2, p, 7-8 ¶ 16) [Emphasis added.] At trial, Teton Springs admitted that the foregoing default provision of the original Lot Sale Agreement was modified by and was never intended to apply to the $126,940 deposit tendered by the Hargers under the parties' agreement to consolidate the two closing dates. At trial, Teton Springs COO Bill Reid testified on this issue as follows:

> Q. And did you – you amended the escrow terms of the Lot Sale Contract; did you not, by the April 30th letter?
> A. We added the additional money to the escrow account.
> Q. And amended the terms?
> A. We did.
> . . .
> Q. Now, that was not placed in escrow, was it?
> A. No, we were able to use that because that's what the agreement of April 30th indicated.
> Q. Now, we talked about the earnest money provision and the default provision of the Lot Sale Contract a moment ago. Do you recall that discussion?
> A. I do.
> Q. And under that provision the Hargers would forfeit the $21,000 if they backed out; correct?
> A. Under that provision and that contract at that time, that was the case.
> . . .
> Q. Now, was it your intention or was it discussed that if the Hargers decided to change their mind and back out a month or two down the road that they would forfeit that $125,000 [sic]?
> A. Nobody ever intended for them to forfeit that amount of money.
> Q. Okay. And did you intend when you wrote the April 30th letter to be able to use that money for six, seven, eight, nine months, and then if you just found somebody who was willing to pay a little more, to just give that money back?
> A. We intended to use the money. We had no intention of giving the money back because we found somebody else to buy the place.

Tr. p. 302 L.13 through p. 304 L. 3. Teton Springs CEO, Tony Vest, similarly testified that:

> Q. And, in fact, you didn't ever intend; did you, Mr. Vest, to have that money and use it for six, seven, eight months and simply find another buyer for a better

price and just give it back to him; did you?
A. No, we never intended to do that.

Tr. p. 607 L. 15 to L. 19.

3. Construction is delayed into November/December 2004.

It is undisputed that the construction of the model cabins suffered lengthy delays as a result of problems Teton Springs encountered with its contractors. Tr. p. 81 L. 25 to p. 84 L. 4 (Fran Harger); Tr. p. 536 L. 17 to p. 539 L. 6; Tr. p. 564 L. 24 to p. 566 L. 1 (Tony Vest); Tr. p. 713 L. 14 to L. 18 (Stan Marshall); Tr. p. 305 L. 23 to p. 307 L. 18 (Bill Reid). It is also undisputed that Teton Springs suffered massive cost overruns in the construction of the model cabins. In an e-mail from Tony Vest to construction manager, Monte Sutton, Mr. Vest remarks that: "The overruns on these units are now causing the lots to be given away. Bottom line, finish the damn things. If a buyer doesn't like it we will give them their money back and sell the unit at a fair price to someone who does." Tr. p. 570 L. 9 to 19 (Tony Vest).

4. The parties' agreement was that closing would occur upon completion and furnishing of the cabin.

At trial, it was undisputed that the parties' agreement expressly provided that closing on the Hargers' model cabin would occur upon completion and furnishing of the cabins. (Appendix, Tab 7). In particular, Teton Springs COO, Bill Reid, testified that:

Q. Okay. And under this agreement under Paragraph No. 2 did the parties agree to a closing date?
A. The Paragraph No. 2 says closing will take place on completion of the cabin construction and furnishing and we agreed to that.
Q. And that was negotiated between Teton Springs and the Hargers; was it not?
A. That was negotiated between Teton Springs and the Hargers.
. . .

Q. Okay. And the Hargers wanted and you agreed that completion of cabin construction and furnishing were two conditions that must occur before closing could take place; is that right?
A. We agreed to that.

Tr. p. 294 L. 17 to p. 295 L. 10.

The closing requirement that the cabin be both completed and furnished was an important contractual provision to the Hargers, because until the house was completed and furnished, it could not be leased back to Teton Springs for use as a model cabin, and the Hargers were relying on the payments from the lease-back agreement to the pay the mortgage payments that would commence upon closing. Tr. p. 90 L. 13 to p. 91 L. 7 (Fran Harger). There is no dispute that Teton Springs was aware of the fact that the Hargers deemed these requirements for closing to be important, because when Bill Reid attempted to change these terms for closing in a letter to the Hargers dated December 5, 2003, Don Harger immediately called Jim Gill to object.

Q. Okay. On the next bullet point, No. 2, would you read the first sentence please?
A. "Once the C of O" – which means certificate of occupancy – "is obtained, we will move as quickly as possible to close the sale."
A. Now, the C of O on your home had already been obtained in November, correct?
A. Correct.
. . .
Q. All right. Now, go on to read the rest of the bullet point, the rest of the paragraph of Bullet Point 2.
A. "We will at the same time give the go ahead to the designated designer to commence the furnishing. We expect substantial completion of the furnishing to take three weeks or so from the closing. Once the unit is furnished and ready to be used as a model, we will agree on a date to begin the $3,000 a month lease back period to be paid after 30 days of model use within 15 days."
Q. Is that provision consistent with the provision in your Model Cabin Sale Agreement?
A. Not a bit, no.

Q. Why did you want the closing to occur after the furnishing?
A. Otherwise we couldn't have gotten our $3,000 payments. We didn't have the kind of money to pay out $3,000 a month.
Q. Were you concerned that Mr. Gill – or Mr. Reid, excuse me, was attempting to change the terms of your Model Cabin Sale Agreement?
A. Yes.
Q. Did you bring that concern to anyone's attention on behalf of Teton Springs?
A. Yes, when I received this, which [sic] I called Jim Gill. We'd always dealt with Jim Gill, and I said, look, this is not what we had in the original agreement. And Jim went to Tony Vest, he kind of went over Bill Reid and went to Tony Vest. He said Tony says he's going to keep this the way we agreed to do it, and I made a note on the bottom memorializing that fact.
. . .
Q. So they reconfirmed their original agreement, they would not close before the cabin was furnished?
A. Yes.

Tr. p. 147 L. 16 to p. 151 L. 3 (Don Harger).

At trial, Teton Springs COO, Bill Reid, testified that, regardless of the terms of the agreement they had in place with the Hargers, the critical consideration to closing for Teton Springs was the fact that the issuance of a certificate of occupancy on the Harger cabin triggered the deadline for payment of their construction loan.

Q. And isn't it true that you and Teton Springs – or you felt tremendous pressure to complete and close the sale on these homes by the end of 2003?
A. I did.
Q. Okay.
A. I did because of particularly the fact that once we got a certificate of occupancy, our construction company had a note outstanding, so Teton Springs was building the cabins. We had contracted with a separate company, Teton Springs Construction, for them to perform to build that. During the course of construction there was a construction loan which we were making payments upon.
Once the C of O is issued, the bank comes knocking on your door and asks you to pay off your construction loan. So I did feel pressure to get this closed. And we had a second issue in play, the financing for the entire development was being considered at that time by Zions Bank. So it would have been very, very

difficult for us to default on the construction loan and then secure the overall financing from the bank for the property. So there was quite a bit of pressure.

Q. Now, your construction loans were due January 10th; is that correct?

A. Give or take. I assume you're correct.

. . .

Q. And you had a grace period of 30 days until February 10th of your loans; true?

A. I don't know that for a fact, but if Tony said it, that must have been the case.

. . .

Q. So in your perception, the C of O is what triggered the closing, you don't care about the agreement you had with the Hargers?

A. The C of O triggered the bank note. The Hargers could have closed with the C of O and they chose not to.

Q. But I'm talking about your agreement with the Hargers that closing would occur upon completion of construction and furnishing.

A. I said that was the agreement that we hoped would occur, but as we look back, and evidence has already been submitted, there was a demand for a new agreement that occurred some time between the middle of the month of November and the 22nd of November, I think, when we submitted our first of the series of new agreements.

. . .

Q. . . . But the important thing was that you close by the 31st, you really weren't concerned about your contract with the Hargers at this point in time; were you, Mr. Reid?

A. We didn't have a contract with the Hargers at this point in time. We were renegotiating the deal based on their demand through Jim Gill to write a new contract.

Q. Now, excuse me. You didn't have an agreement executed on August 30th entitled Model Cabin Sale Agreement? I thought we've already been through that.

A. As of August 30th, that was our deal.

Q. Okay. Did that not become a deal because the Hargers wanted to put a couple of documents into a consolidated agreement? Did this sale –

A. As of November –

Q. Let me finish my question. Did the Hargers somehow indicate to you that this document was abandoned, it no longer existed because they wanted to put it into [sic] one document?

A. They didn't agree – they didn't indicate that to me expressly.

Tr. p. 325 L. 9 to p. 331 L. 17. Teton Springs CEO, Tony Vest, testified that he also had little regard for the closing conditions set forth in the Hargers' contract:

> Q. Okay. And if the buyers weren't ready to close by the 31st you were going to get out of that contract; were you not?
> A. If the buyers weren't ready? If the buyers weren't ready, yes, sir.

Tr. p. 591 L. 8-12.

The certificate of occupancy on the Harger cabin was issued on November 26, 2003 (Tr. p. 807 L. 6-8 (Bruce Nye)); however, an appraisal of the home dated November 24, 2003, indicated that the appraisal value was "subject to completion [of the home] per plans and specifications." Tr. p. 80 L. 9 to p. 81 L. 3 (Fran Harger). In an e-mail from construction manager, Monte Sutton, to Tony Vest dated December 19, 2003, Mr. Sutton stated that as soon as the shower enclosures were installed, construction on the cabin will be completed and the cabin will be ready to close. Tr. p. 314 L. 1-9 (Bill Reid). The cabin, however, was not furnished until some time in February 2004, because, according to Bill Reid, "We didn't have a requirement to furnish them. We didn't even have a contract." Tr. p. 355 L. 2-10 *see also* Tr. p. 658 L. 16 to p. 659 L. 20 (Tony Vest).

5. Punch lists and inspections in December 2004.

One of Teton Springs' defensive theories at trial was that the Hargers unreasonably prevented defendant's performance under the contract by conducting unreasonable inspections that interfered with the progress of construction and by refusing to finalize a punch list for the cabin. R. Vol. III p. 1047, 1048 (Jury Instruction Nos. 9 and 10); Tr. p. 528 L. 13 to p. 529 L.

12; p. 571 L. 4 to p. 572 L. 8 (Tony Vest). This theory was wholly unsupported by the evidence at trial.

With the exception of his vaguely insistent testimony that the Hargers had interfered with construction, CEO Tony Vest was unable to identify a single instance where such interference had occurred:

> Q. Well, I keep hearing you use terms like, "stream of people, parade of people, representatives, relatives." I'm trying to get an idea, a specific and clear detail of who all these people were and when that happened. So far you've only told me Shane Elder. We don't know when that happened. Keith Harger, and you can't say whether or not he ever interfered, true?
> A. Well, I can tell you, sir, that Tom Lewis told me and Tom Lewis was the man in the field and Tom Lewis[3] told me specifically that every day in December somebody came through the cabin and held up construction.
> . . .
> Q. Wasn't, in fact, the point man dealing with the Hargers on the preparation of the punch list Stan Marshall?
> A. It was Monte Sutton up until probably about the first of December and then it became Stan Marshall.[4]
> Q. In early December Stan Marshall was sending e-mails back and forth with Mr. Harger; is that not true?
> A. That's true.
> Q. So Stan Marshall would probably know better than anybody about who was doing the inspections on the Harger home; would he not?
> A. From December on, yes.
> . . .
> Q. Now, did he tell you what he meant by interfering with progress of construction? Did Hargers or any expert ever say to any contractor stop the work, we don't want this going forward?
> A. I know Ms. Allen[5] had said that. I'm not sure whether the Hargers did or

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[3] Teton Springs employee, Tom Lewis, was never called to testify at trial.

[4] Teton Springs employee, Monte Sutton, was never called to testify at trial.

[5] Richard and Annis Allen were originally named as co-plaintiffs in this action. The Hargers and the Allens were very good friends, and the Hargers had referred the Allens to Teton Springs as

not.

. . .

Q. Did Hargers ever stop anyone from performing construction on their home?

A. I'm going to let Stan respond to that because I don't recall specifically.

. . .

Q. Now, as of the present time all we've established and all we know of – or you can't even dispute [is] that the first time any professional came in to look at that was when he [Shane Elder] came in after the 22nd [of December]?

A. So you're telling me that I'm supposed to believe that nobody came in till then?

Q. I'm not telling you anything. I'm asking you for your testimony and so far you have not been able to identify an expert who came into that home before December 22nd.

A. As I've told you, I can't actually identify any experts who came into that home.

Tr. p. 627 L. 14 to p. 630 L. 13; p. 640 L. 24 to p. 641 L. 10 (Tony Vest).

Construction manager, Stan Marshall, gave similar testimony regarding his inability to identify any particular instance where the Hargers had conducted unreasonable inspections or had interfered in any way with the construction on the home:

Q. You talked a lot about all the demands and inspections and all the people coming through, isn't it true you're lumping in the Annis Allen, the family inspections of her home, Mr. Marshall? Isn't that true?

A. Yes.

Q. Okay. Now at your deposition you talked about all the interference from Annis Allen and all those problems; did you not?

A. Yes.

Q. And that's what you were talking about at your deposition and never once at your deposition did you say Hargers interfered with the progress of construction, did you, sir?

A. No, but may I explain?

. . .

Q. Now, one final thought. You keep talking about how the Hargers were

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buyers for the model cabin located next door to the Hargers' cabin. The Allens settled their claim with Teton Springs prior to trial. R. Vol. III p. 975 to 990.

unreasonable and interfering and bringing in family members and inspections. Isn't it true that these inspections did not even begin until mid December, 2003?
A. I don't know.

Tr. p. 721 L. 8 to L. 22; p. 734 L. 20 to L. 25.

The first punch list on the Harger home was prepared on December 19, 2003. Tr. p. 567 L. 5 to p. 568 L. 6 (Tony Vest). Prior to the compilation of the first punch list on December 19, 2003, the Hargers had not conducted any formal inspections of the cabin. At trial, Fran Harger testified to this fact:

Q. Did you or your husband conduct any inspections during this construction process?
A. We did walk throughs. Because our son is an architect, we had him go out with us a couple times. As far as any serious inspections, we didn't do any until at the very end.
Q. Until the very end? And when you say walk throughs, can you tell the jury what you mean by that?
A. Well, we were – I guess anyone building a home like this you are concerned and you do walk through to see what the progress is. However, we probably made, I don't know, maybe not more than one or two walk throughs a month, and most of them were on the weekends. If we – the couple of times we took my son out there it had to be weekends because he was always working during the week and couldn't go with us.
Q. Was there ever a point in time that you or your husband ever interfered with the process or progress of construction?
A. Not to my knowledge.
Q. Did anyone at Teton Springs during July, August, September, October or November ever tell you that you or your husband were interfering with the progress of construction?
A. No.

Tr. p. 84 L. 10 to p. 85 L. 10.

The Hargers son, Keith Harger, testified at trial that he had visited the cabin three times during the entire construction period. The first visit in May or early June 2003 was just to see the site where the cabin would be located. Tr. p. 772 L. 23 to p. 773 L. 9 (Keith Harger)

(Appendix, Tab 9). The second inspection occurred in mid-August/September, when the Hargers asked Keith to "come and look at a few particular instances where there were some things that weren't working in the house and see if I could suggest a possible solution." Appendix, Tab 9, p. 774 L. 6 to L. 10.

The particular items at issue during the second visit were a stairway built too narrow at the bottom to meet building code, two (2) closets that had been built too small to hang clothes in, and a set of kitchen windows that would not open because of the overhang of the gabled roof. Appendix, Tab 9, p. 774 L. 10 to p. 783 L. 5 (Keith Harger). With regard to each of these items, Keith proposed an easy and workable solution, all of which were ultimately implemented by Teton Springs. *Id.* Construction was never stopped or impeded in any way as a result of Keith's inspection or recommendations in connection with these issues. Appendix, Tab 9, p. 783 L. 20 to p. 784 L. 1.

On December 19, 2003, Teton Springs sent the Hargers the first draft of the punch list for the cabin. R. Vol. III p. 1267 (Trial Exhibit No. 45). On December 22, 2003, construction manager, Stan Marshall, sent the Hargers a revised copy of the punch list containing corrections to the values of the some of the items. R. Vol. III p. 1267 (Trial Exhibit No. 47). The December 22, 2003 punch list was compiled from a list of items prepared by both Stan Marshall and Don Harger. Tr. p. 173 L. 19-24 (Don Harger). On December 29, 2003, Don Harger met with Stan Marshall to conduct an inspection of the cabin. Tr. p. 173 L. 9-11 (Don Harger). On December 31, 2003, Stan Marshall again faxed the Hargers a revised punch list based on the December 29th

inspection, and requested a meeting with the Hargers later that day to go over it. R. Vol. III p. 1267 (Trial Exhibit No. 50).

After the Hargers met with Stan Marshall on December 31st to review the revised punch list, they requested that they be allowed to have their son Keith perform a final inspection the following day, January 1, 2004. Tr. p. 725 L. 7 to p. 726 L. 20 (Stan Marshall). At trial, Keith Harger testified that the primary reasons for this request was his parents' concern "that there was a large icicle [an] ice stand forming in front of the house, between the front door and the garage and was spilling down the side of the building. It started to run out in front of the garage. It was touching the wall and was a fairly massive piece of ice so they wanted me to look at that and see if I could offer some – tell them what was going on." Appendix, Tab 9, p. 784 L. 9-17. Keith's recommendation to his parents, based on the late stage of construction of the cabin and the various conditions that might be causing the formation of such a massive column of ice from the roof to the ground, was to simply to request a longer warranty on the cabin. Appendix, Tab 9, p. 787 L. 25 to p. 788 L. 8 (Keith Harger).

During his January 1st inspection of the cabin, Keith Harger also observed that each bedroom was served only by a single, very small heat register. Keith had previously reviewed the mechanical drawings for the cabin, knew that the system as installed differed from what had been drawn, and was concerned that the system may not be adequate. For this reason, Keith recommended that his parents have an expert mechanical engineer evaluate the system to ensure its adequacy. Keith also advised them that, if it was adequate, "to just live with it and not worry about the change." Appendix, Tab 9, p. 790 L. 12 to p. 791 L. 19.

Based on Keith's recommendation, the Hargers engaged mechanical engineer, Shane Elder, to conduct an inspection of the cabin on January 8, 2004. The results of that inspection were faxed to Teton Springs on January 12, 2004, and included the following findings:

> I believe the heating systems in both residences (Lot 23 & Lot 24) to be marginally designed and installed, which may result in substandard comfort levels in some areas. Given the quality of construction, the capacity of the electric furnaces (20kw) appear to be sufficient for the entire house, with some less comfortable areas caused by inadequate air distribution and limitations inherent to one zone forced air systems on multi-level homes.
>
> Because both residences are near completion, your options for solutions to heating system deficiencies are limited. I would suggest installing electric toekick or wall heaters in all bathrooms. I would also suggest installing furnace thermostats with a Fan ON-OFF subbase which will allow owner to continually operate the furnace blower without a call for heat; this will help minimize heating system inadequacies.

R. Vol. III p. 1267 (Trial Exhibit No. 70 p. 2). The Hargers did not conduct any further inspections on the cabin, because Teton Springs canceled their contract the day after it received the report from the heating engineer. Tr. p. 210 L. 23 to p. 214 L. 1. According to Tony Vest, "They continued to go through the cabins a lot themselves, but then they started sending so-called consultants or people – and it looked like they were just trying to dig up things to keep from closing." Tr. p. 528 L. 13-16.

6. Hargers request an integrated agreement; contract negotiations in December 2004.

Towards the end of November 2003, the Hargers requested that all of the parties' various written agreements be consolidated into a single integrated document prior to closing. Tr. p. 153. L. 12 to p. 154 L. 24 (Don Harger). Another of Teton Spring's defensive theories at trial was that the Hargers expressed an intention to abandon their original purchase and sale

agreement as a result of the negotiations that transpired in connection with the drafting of the integrated agreement. R. Vol. III p. 1047, 1049 (Jury Instruction Nos. 9 and 11); Tr. p. 593 L. 11- 21 (Tony Vest). In particular, Teton Springs claimed that the Hargers had introduced so many new terms into the proposed draft of the integrated agreement that they "invalidated the contract" that the parties had as of August 30, 2003. Tr. p. 594 L. 10-20 (Tony Vest).

The items that were proposed by the Hargers and negotiated with Teton Springs during the period from December 22 through December 31, 2003, were the following:

- the amount of retention to withhold at closing to cover the items on the punch list
- a warranty on the log cabin
- an extended warranty on the appliances to cover the lease-back period during which the cabin would not be lived in
- a provision showing that they were entitled to a year's worth of complimentary green fees for referring the Allens as buyers to Teton Springs
- a provision regarding payment of personal property taxes
- a credit associated with the cost of pavers that were chosen as an upgrade to the back patio

Tr. p. 159 L. 22 to p. 169 L. 25 (Don Harger). By December 31, 2003, all but two of these items had been resolved. The resolution of each of these matters was as follows:

- Retention to cover punch list: Hargers originally requested 200% but conceded to 150%. Teton Springs refused to hold back more than 100%. Tr. p. 160 L. 24 to p. 162 L. 11; p. 176 L. 23 to p. 177 L. 5 (Don Harger).
- Warranty on cabin: Hargers originally requested 5 years (upon advice of their son, Keith), but conceded to the 1 year warranty offered by Teton

Springs. Tr. p. 162 L. 12 to p. 163 L. 17; p. 181 L. 19 to p. 182 L. 1; p. 191 L. 1-6 (Don Harger).

- Warranty on the appliances: Hargers originally requested a three year extension on the manufacturer's warranty. Teton Springs offered manufacturer's warranty only. Hargers requested permission to enter the cabin from time to time to turn the appliances on to check them and keep them working. Teton Springs said no. Tr. p. 163 L. 18 to p. 164 L. 10; p. 184 L. 22 to p. 185 L. 11; p. 191 L. 7-17 (Don Harger).

- Complimentary green fees: Hargers had been promised a year's fee golf membership in the April 3, 2003 letter from Jim Gill. They misunderstood this incentive to mean "green fees" (neither of the Hargers golf). Despite the written offer they had from Teton Springs entitling them to the golf membership, they conceded this request during negotiations. Tr. p. 164 L. 11 to p. 166 L. 18; p. 182 L. 14 to p. 183 L. 11 (Don Harger).

- Personal property taxes: This provision was mistakenly suggested by the Hargers' attorney, Frank Hess, and was taken out. Tr. p. 166 L. 19 to p. 167 L. 8; p. 182 L. 2-9 (Don Harger).

- Cost of pavers: The Hargers believed there was a discrepancy in the price of the pavers they were charged for. Tr. p. 168 L. 3 to p. 169 L. 25 (Don Harger). What they sought was an explanation as to the amount charged. At trial, Teton Springs contended that the Hargers were "trying to renegotiate the price of the lot." Tr. p. 608 L. 3 to p. 611 L. 10 (Tony Vest); Tr. p. 248 L. 19 to p. 249 L. 4 (Don Harger).

Thus, as of December 31, 2003, the only items still being negotiated were the amount of money to be held back as a retainer on the punch list and the warranty on the appliances during the term of the lease agreement. *See* R. Vol. III. p. 1267 (Trial Exhibits 26, 49, 50, 54, 55, 56, 57) (collectively, Appendix, Tab 10).[6] Nevertheless, Teton Springs maintained at trial that the

[6] During the negotiation over the additional terms in the integrated agreement, Teton Springs also attempted to introduce new terms into the integrated draft, including an arbitration provision.

"cumulative nature" of the new terms and the time it was taking to resolve them demonstrated to Teton Springs that the Hargers had no intention of ever closing on this cabin:

> Q. Okay. Now the Hargers – you had the Hargers' down payment and they had patiently wanted for their home to be completed from July into December; isn't that true?
> A. Well, why wouldn't they close then?
> Q. Well, why if they had waited patiently for six months were you now telling them you've got two weeks to inspect this home, finish your inspection and close by the end of the year?
> A. Because we had to get a contract signed and we had already passed up multiple opportunities to sign contracts and close.
> Q. Isn't it true it wouldn't have hurt Teton Springs at all to postpone it a little longer, a few weeks to get the punch list finalized and get it in place, there would have been no harm, damage or loss to Teton Springs at all by –
> A. We could have and that wasn't the way it was going. It was going towards non-closure. We were getting further apart, particularly on the punch list items.

Tr. p. 660 L. 17 to p. 661 L. 19 (Tony Vest).

7. Teton Springs cancels the Hargers' contract.

On December 31, 2003, after their meeting with Stan Marshall to inspect the cabin, the Hargers met with Bill Reid and Richard and Annis Allen at the offices of Teton Springs to discuss the remaining integrated contract negotiations. Tr. p. 172 L. 2-18 (Don Harger). At the close of this meeting,[7] Bill Reid mailed a letter to the Hargers and the Allens summarizing the status of the those negotiations, and stating that:

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[7] This is a factual dispute as to when the Hargers and the Allens first received this letter. Bill Reid testified that he prepared it in advance of the meeting and handed copies to the Allens and Hargers at the start of the meeting. Tr. p. 379 L. 9 to p. 380 L. 20. However, Annis Allen testified that they were never given this letter at the meeting. Tr. p. 426 L. 13-19. Annis Allen testified that she never received a copy of the letter (it was only mailed to the Hargers), Tr. p. 427 L. 23 to p. 428 L. 2, and Don Harger testified that he did not receive this letter until he received it in the mail on January 7, 2004. Tr. p. 193 L. 4-7.

> I am looking forward to closing and at closing will jointly sign all documents including the one we drafted on the 31st. I will extend the close date to January 5th, which should allow each party time to finalize documents.
>
> Should either the Hargers or the Allens chose not to close or be unable to close through no fault of Teton Springs by January 5th, the original agreement will be canceled and Teton Springs will move forward with alternate plans to satisfy obligations on these properties.

Appendix, Tab 9 (Trial Exhibit 56). At trial, Annis Allen testified that, in light of the amount of notice they were given, it would simply not have been possible to conduct a closing on Monday, January 5, 2004:

> Q. Was that ever discussed with Mr. Reid at that meeting, this closing on January 5th?
>
> A. He mentioned that, but I couldn't understand how we could close when we was trying to work on an agreement to put everything together and it was – remember, the next day was New Year's, you had Friday, you had Saturday and Sunday and then we was supposed to close on Monday? I couldn't see that happening.

Tr. p. 427 L. 10-17. Similarly, Jessica Nead, the Harger's loan officer, testified that the requirements had not been met to conduct a closing on January 5, 2004, in part because Teton Springs had never sent a copy of the certificate of insurance or the insurance binders to the Harger's lender so that the loan could fund. Tr. p. 465 L. 7 to p. 476 L. 12.

From December 31, 2003, through January 12, 2004, the Hargers engaged in numerous conversations and contacts with Teton Springs with the intention and expectation that they were moving towards a closing on the cabin. Tr. p. 195 L. 21 to p. 199 L. 14; p. 208 L. 5 to p. 210 L. 18 (Don Harger). Teton Springs never once mentioned the purported January 5th closing to the Hargers during any of the conversations that transpired from December 31, 2003, to January 12, 2004. Tr. p. 197 L. 12-17 (Don Harger); Tr. p. 385 L. 22 to p. 386 L. 22 (Bill Reid).

On January 7, 2004, Teton Springs sold the Hargers' cabin for $745,000 to V&R Investments, LLC, a Michigan company owned by Teton Springs COO, Bill Reid, and his business partner Vladimir Volchko. R. Vol. III. p. 1267 (Trial Exhibit 66) (Appendix, Tab 11). On January 13, 2004, Teton Springs' attorney, Roy Moulton, sent the Hargers a letter stating that their contract had been canceled and tendering the return of their deposit in satisfaction of all claims. R. Vol. III p. 1267 (Trial Exhibit 72).

At trial, it was undisputed that the sale of the Hargers cabin by Teton Springs to insider Bill Reid was not an arm's length transaction. Tony Vest testified that the cabin had been sold to V&R Investments "at cost," Tr. p. 533 L. 13 to L. 15, and Bill Reid testified that: "That was not a negotiated price. So Tony offered that price to us or anybody who we could find to buy that cabin." Tr. p. 390 L. 12-16. Three months later, on March 6, 2004, V&R Investments sold the Hargers' cabin to a third party buyer ("the Chipmans") for $875,000. R. Vol. III p. 1267 (Trial Exhibit 75) (Appendix, Tab 12).

II. ISSUES PRESENTED ON APPEAL

A. Did the district court abuse its discretion in ordering a new trial pursuant to Idaho Rule of Civil Procedure 59(d)(5)?

B. Did the district court abuse its discretion by not limiting the new trial to the issue of damages only?

C. Are the Hargers entitled to an award of attorneys' fees and costs on appeal pursuant to Idaho Code Section 12-120(3); *Erickson v. Flynn*, 138 Idaho 430, 64 P.3d 959 (Ct. App. 2002); and Idaho Appellate Rule 40?

III. ARGUMENT

A. The district court did not err in granting the Hargers a new trial because the requirements for granting a new trial have been met in this case.

Idaho Rules of Civil Procedure Rule 59(d) provides that: "A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons: . . . (5) Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice."

Whether the trial court was correct in granting a new trial or in the alternative an additur is reviewed under an abuse of discretion standard. *Pratton v. Gage*, 122 Idaho 848, 850, 840 P.2d 392, 394 (1992). When reviewing an alleged abuse of discretion by the trial court, the Court must determine: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer bounds of its specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 590, 67 P.3d 68 (2003).

In acting within the outer boundaries of its discretion on ruling on a motion for new trial, the trier court must first consider whether the verdict was against the weight of the evidence so that the ends of justice would be served by vacating the verdict, and next consider whether a different result would follow a retrial. *Burggraff v. Chaffin*, 121 Idaho 171, 173-174, 823 P.2d 775 (1991).

1. The district court properly determined that the damages awarded by the jury were not supported by the weight of the uncontradicted evidence of record.

The district court should grant a new trial or additur for inadequate damages only if, after assessing the credibility of the witnesses and weighing the evidence, it determines that the verdict is not in accord with the clear weight of the evidence. *Puckett v. Verska*, ___ Idaho ___, 158 P.3d 937 (2007); *Hudelson v. Delta Int'l Mach. Corp.*, 142 Idaho 244, 248, 127 P.3d 147, 151 (2005). When the district court believes that substantial and competent evidence supports the verdict but its assessment of damages substantially diverges from the jury's award of damages such that only passion or prejudice could explain it, then it should grant a new trial or an additur. *Collins v. Jones*, 131 Idaho 556, 558, 961 P.2d 647, 649 (1998). "Indeed, it has not only been held that the trial court *may* set aside a verdict which is contrary to the evidence, but that there is a positive duty upon the trial court to do so." *Robertson v. Richards*, 115 Idaho 628, 632, 769 P.2d 505 (1987).

The moving party need not prove that passion or prejudice affected the jury's verdict; the appearance alone is sufficient to justify a new trial or additur. *Dinneen v. Finch*, 100 Idaho 620, 625-26, 603 P.2d 575, 580-81 (1979). The existence of passion or prejudice appears when the jury ignores or disregards unrefuted evidence at trial. *Puckett,* 158 P.3d at 944 (holding that passion or prejudice appeared to have affected the award of damages where jury awarded nothing for economic damages even though the defendant never introduced evidence to refute medical expense and income claims); *Dinneen*, 100 Idaho at 627, 603 P.2d at 575 (holding that a verdict of $540 over the uncontradicted medical expenses and lost property with apparently no

lost wages at all "suggested a verdict appearing to have been rendered under the influence of passion or prejudice.")

In its order granting a new trial, the trial court correctly observed that "the damages [awarded by the jury] are not consistent with the responses the jury gave on the verdict form." Appendix, Tab 1 p. 2. In particular, the court found that: "The jury determined that Teton Springs breached their contract with the Hargers. That finding, coupled with their answer that the contract did not limit damages to a return of the down payment, should have entitled Hargers to a minimum award of the difference between the reasonable value of the property at the time of breach . . . and the contract price . . . ." Appendix, Tab 1 p. 3. Such an award should have been given because "[the Hargers] alone provided evidence regarding damages for contract breach." Appendix, Tab 1 p. 3. Given these factors, the trial court found that it "cannot reconcile the award of $178,000 in view of the uncontradicted evidence of purchase price and value." Appendix, Tab 1 p. 3.

Teton Springs contends that the trial court's determination that the jury's award of damages is irreconcilable with its liability findings fails to demonstrate "an exercise of reason" because "there were multiple factors the jury could consider in factoring damages." Appellant's Brief, p. 17. Teton Springs then proffers an example of how the jury might have selected any two items of damage and added them together to arrive at an amount in the neighborhood of $178,000. Appellant's Brief, p. 18.

This argument is without merit for the reason that under the rule in *Pierstorff v. Gray's Auto Shop,* 58 Idaho 438, 447, 74 P.2d 171, 175 (1937), cited in *Dinneen v. Finch*, 100 Idaho

620, 625-26, 603 P.2d 575, 580-81 (1979), the jury was not free to arbitrarily or capriciously disregard any of the unrefuted evidence that was submitted in support of the Hargers' damages claim. During the trial, Don Harger testified that the fair market value of the home at the time Teton Springs breached the contract was $875,000. Tr. p. 433 L. 20-24. Mr. Harger testified at length regarding the reasons supporting that value figure, including the fact that Teton Springs COO, Bill Reid, resold the property to a third party purchaser for that price only three months later on March 6, 2004.[8] Tr. p. 433 L. 10 to p. 442 L. 10, p. 449 L. 12 to p. 461 L. 15 (Appendix, Tab 13).[9]

Teton Springs made virtually no attempt to challenge or impeach Mr. Harger's damages evidence, and offered no evidence refuting the values testified to by Mr. Harger. The only evidence offered by Teton Springs in rebuttal to Mr. Harger's damages evidence was the testimony of Teton Springs CEO, Tony Vest, that "other costs" that needed to be considered. Tr.

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[8] Mr. Harger also explained that he had considered all of the appraisals on the property, including the Getling appraisal in November for $650,000 and the Phillips appraisal in December for $732,000. Mr. Harger also considered the Margo Beldin offer in September of $753,900 and the price that Teton Springs sold the home to Bill Reid and his company, V&R Investments, of $745,000. Mr. Harger testified that of all of the figures, the Chipman contract was the only contract that truly reflected the fair market value at the time of breach, because it is the only evidence of what a "willing buyer" would pay a willing seller in an "open marketplace." Appendix, Tab 13.

[9] In its brief, Appellant contends that the court erroneously used, without reference to the evidence, the sale to the Chipmans as its source of the market value of the cabin at the time of breach and that "nothing was ever found by the court that suggested the sale to V&R was not a bona fide transaction." Appellant's Brief, p. 18-19. To the contrary, both Mr. Reid and Mr. Vest testified at trial that the sale from Teton Springs to Bill Reid and his partner in V&R Investments was not an arm's length transaction. *See* Tr. p. 533, L. 13-15 (Tony Vest); Tr. p. 390, L. 12-16 (Bill Reid).

p. 546 L. 11 to p. 547 L. 13 (Appendix, Tab 14). Mr. Vest, however, failed to opine what the precise nature or amount of these "other costs" might be that could be used to offset the Hargers' damages, and particularly how such costs were to be identified and/calculated in light of the lease-back and rental agreements that would have covered the Hargers' mortgage payments for at least the first six years of ownership. Appendix, Tab 14.

Teton Springs also failed to contest the fact that each of the items of damage claimed by the Hargers stemmed from the express terms of the parties' written agreements. To the contrary, Mr. Reid and Mr. Vest both testified that Teton Springs had agreed as part of its contract with the Hargers that:

1. the Hargers were entitled a $21,000 rebate on the cabin purchase price; Tr. p. 289 L. 7 to p. 290 L. 20 (Bill Reid); Tr. p. 551 L. 10 to p. 560 L. 22 (Tony Vest);
2. the Hargers could purchase a golf club membership at a discounted price; Tr. p. 288 L. 6 to L. 13 (Bill Reid); Tr. p. 551 L. 10 to p. 560 L. 22 (Tony Vest);[10]
3. the Hargers were entitled to three (3) weeks free cabin rental for three (3) years after the end of the lease-back period; Tr. p. 288 L. 14 to L. 21 (Bill Reid); Tr. p. 551 L. 10 to p. 560 L. 22 (Tony Vest);
4. the Hargers would purchase the model cabin as part of a Section 1031 property exchange Appendix, Tab 7 (Bill Reid); Tr. p. 551 L. 10 to p. 560 L. 22 (Tony Vest).

[10] Bill Reid also testified that the Hargers were entitled to complimentary green fees for the golf course as a result of referring their friends the Allens as another buyer in the Teton Springs subdivision. Tr. p. 291 L. 7 to 21. The Hargers conceded these fees in their negotiations with Teton Springs over the integrated contract. Tr. p. 266 L. 6 – 12 (Don Harger).

In fact, Teton Springs CEO, Tony Vest, testified that "I think up until probably November there was no request that I can recall that we didn't accommodate." Tr. p. 520 L. 21-23.[11]

There is no evidence in the record anywhere showing that the contractual terms upon which the Hargers based their claim for damages were not part of the contract that was breached by Teton Springs in January 2004. Nor is there any evidence of record to refute the values assigned by the Hargers to each of their items of damage. Because there is nothing in the record to show that Don Harger was anything less than a credible witnesses, and his testimony was not inherently improbable, "***for the jury . . . to disregard his testimony on any point, including fair market value, was error.***" *Dinneen,* 100 Idaho at 625-26, 603 P.2d at 580-81. For this reason, the district court correctly found that the jury's $178,000 damages award was unsupported by the weight of the evidence in this case and that the ends of justice would be served by vacating the verdict in favor of a new trial.

2. The district court properly determined that a different result would likely result upon retrial.

If the court determines that that verdict is against the great weight of the evidence, the court must additionally determine that a different result would follow a retrial. *Blaine v. Byers*, 91 Idaho 665, 670, 429 P.2d 397 (1967). In their opening brief, Teton Springs contends that this determination has not been satisfied in this case because the district court, in its order granting

[11] The district court's finding that "other contract terms for which Hargers sought damages were disputed by Teton Springs" is clear error. Nowhere in the record does Teton Springs claim that the rebate, discounted golf membership, lease-back agreement, rental program agreement, or 1031 exchange were not part and parcel of the parties' purchase and sale agreement as of August 30, 2003.

the Hargers a new trial, stated that: "This Court is not satisfied that a new trial will alter the ultimate outcome in this case because the amount awarded is approximately what this Court would have awarded on the evidence presented at trial." Appendix, Tab 1 p. 3.

At first glance, this sentence does appear to be in direct contradiction with the trial court's decision to grant a new trial. However, a careful reading of this sentence, in light of the meaning of the court's order as a whole, yields a more consistent result. The district court correctly identifies the problem that a liability verdict in favor of the Hargers cannot be reconciled with the amount of damage awarded, but that the damages awarded could be reconciled to a liability finding in favor of Teton Springs. Teton Springs suggests that this means that, either way, the Hargers are likely to be awarded the same damages if this matter is re-tried. This argument is without merit.

If the matter is retried and a liability verdict is found in favor of Teton Springs, the Hargers may be awarded the same damages as they recovered in the first trial. BUT, if the case is retried and a liability verdict is found again in favor of the Hargers, the Hargers are **not** likely to receive the same award of damages, because, as the district court correctly points out, an award of $178,000 in damages cannot be reconciled as the amount of damages caused by Teton Springs' breach of the contract in the face of unrefuted evidence to the contrary. Only the influence of passion or prejudice explains the result that was rendered in this case, and there is no reason to believe that the same passion or prejudice would produce similar results upon re-trial.

Based on all the of the findings presented by the district court in its order granting a new trial, one of two results is likely to occur if this matter is retried. Either the jury will change its

verdict as to liability and sustain its award of damages to the Hargers, or the jury will sustain its verdict as to liability and change its award of damages to the Hargers. No matter which of these results happens, there is a strong probability that the outcome will be different than the verdict currently under review.

The district court demonstrated that it understood the discretionary nature of the decision, the legal boundaries within which the decision should be made, and it exercised reason in reaching its result. *See Sun Valley Shopping Ctr. Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1001 (1991). For this reason, the court's order granting a new trial should be affirmed.

B. The district court abused its discretion by not limiting the new trial to the issue of damages only.

"The purpose of limited retrials is to expedite the administration of justice by avoiding costly repetition." *Smallwood v. Dick*, 114 Idaho 860, 864, 761 P.2d 1212, 1216 (1988). In determining if the district court abused its discretion in restricting a trial to the issue of damages, we must "conclude that (1) the damages awarded by the jury were inadequate, (2) the issue of liability was close, and (3) other circumstances indicated that the verdict was probably the result of prejudice, sympathy, or compromise, or that for some other reason, the liability issue was not actually determined by the jury." *Id.* (citing *Leipert v. Honold*, 39 Cal.2d 462, 247 P.2d 324 (1952)).

In this case, the record supported an order granting an additur and/or limiting a new trial to the issue of damages only. The trial court clearly found that the damages awarded were inadequate, fulfilling the first factor of the test in *Leipert.*

The second *Leipert* factor is also met in this case because there is no evidence to suggest that liability was a close issue in this case. At trial, Teton Springs initially advanced the theory that they never entered into a contract with the Hargers for the sale of property. Tr. p. 25 L. 15 to p. 26 L. 6; p. 114 L. 13-16.[12] By the time the matter was ready for deliberation by the jury, Teton Springs had abandoned its frontline position, when it agreed to the submission of the following jury instruction: "There is no dispute between plaintiffs and defendant (Teton Springs) that as of August 30, 2003, there was such a contract between them regarding the sale and purchase of the lot and model cabin which are the subject of this dispute." R. Vol. III p. 1044 (Jury Instruction No. 7).

With regard to each of the defensive theories advanced by Teton Springs at trial, the following jury instructions were each properly issued:

> Jury Instruction No. 8: The plaintiffs (Hargers) have the burden of proving each of the following propositions:
> 1. A contract existed between plaintiffs and defendant, Teton Springs Golf & Casting, LLC (Teton Springs);
> 2. Teton Springs breached the contract;
> 3. That plaintiffs have been damaged on account of the breach; and
> 4. The amount of damages.
>
> If you find from your consideration of all of the evidence that each of the propositions required of the plaintiff has been prove, then you must consider the issue of the affirmative defenses raised by the defendant, and explained in the next instruction. If you find from your consideration of all the evidence that any of the propositions in this instruction have not been proved, your verdict should be for the defendant. (R. Vol. III p. 1046)

[12] Question by defense counsel to Francine Harger: "You're aware that Teton Springs denies that any contract ever resulted between the two parties, you know that that's our position as we come into court today?"

Jury Instruction No. 9: In this case the defendant (Teton Springs) has asserted certain affirmative defenses. The defendant has the burden of proof on each of the affirmative defenses asserted.

1. Defendant asserts that plaintiffs unreasonably prevented defendant's performance under the contract.
2. Defendant asserts that the plaintiffs' actions indicated their intent to abandon the terms of the contract.
3. Alternatively, plaintiffs' remedy for any breach of the contract is – by the contract itself – a return of plaintiff's earnest money/down payment.

If you find from your consideration of all the evidence that any of these propositions has been proven by the defendant, then your verdict should be for the defendant. If you find from your consideration of the evidence that none of the propositions has been proven, then the defendant has not proved the affirmative defenses alleged in this case. (R. Vol. III p. 1047)

Jury Instruction No. 10: The defendant, Teton Springs, has asserted the defense of prevention of performance. The defendant has the burden of proving that plaintiffs unreasonably prevented or substantially hindered the defendant's performance of the contract. If this affirmative defense is proved, the defendant is excused from performance. (R. Vol. III p. 1048)

Jury Instruction No. 11: A contract is abandoned where both parties expressly abandon the contract, or where one party acts in a manner indicating an intention to abandon the contract, and the other party acquiesces therein. Abandonment of a contract is a question of intent. It may be implied from the parties' actions. If the contract is abandoned, the law leaves the parties where it finds them. (R. Vol. III p. 1049).

In addition to the foregoing instructions, the jury's verdict form contained three independent special interrogatories by which the jury could specifically address the viability of each of the affirmative defenses explained in these instructions and advocated by Teton Springs at trial. Yet despite each of these opportunities, the jury still issued a verdict with a finding of liability in favor of the Hargers. On the basis of this record, there is no indication that the jury found the liability issue in this case to be a close one.

With regard to the possibility of a compromise verdict, the district court "does not point to any particular circumstances in the record to suggest that the verdict on liability was subject to compromise." *Puckett,* 158 P.3d at 944. To the contrary, as this Court stated in its opinion in *Smallwood*:

> While only nine of the twelve jurors signed the special verdict, this in itself does not demonstrate that the verdict was a compromise. Any implication that may arise from this fact weighs in favor of the verdict not being a compromise, since the dissenters, whether they would have voted for no liability or for more damages, did not concur, and therefore, could not have caused compromise. The fact that the jury awarded the plaintiffs less than the amount of special damages that was supported by the unrebutted evidence at trial also does not prove that the verdict was a compromise.

Smallwood, 114 Idaho at 865, 761 P.2d 1217.

Again, the strongest evidence in favor of the fact that the jury's verdict was not compromised is the answers given by the jury on the special verdict form. The first three questions on that form ask:

> QUESTION NO. 1: Was there a contract, in January of 2004, between plaintiffs and defendant (Teton Springs) for the purchase and sale of a lot and model cabin?
>
> QUESTION NO. 2: Did Teton Springs breach the contract with the plaintiffs?
>
> QUESTION NO. 3: Did the parties intend by their contract that the plaintiffs' sole remedy for Teton Springs' breach of contract was to be the return of plaintiffs' down payment?

R. Vol. III p. 1062-1063. If the jury had been struggling with the issue of whether or not to hold Teton Springs liable for breach of the contract and damages caused to the Hargers stemming from that breach, the jury had not one, but three, separate opportunities on the verdict form to avoid that consequence. In addition to a finding that Teton Springs did not breach the contract,

the jury had the option of either finding that no contract had ever existed; or finding that the Hargers' remedy was limited to the return of their deposit. Yet, in answer to all three of these questions, the jury found in favor of the Hargers.

The trial court's suggestion[13] that what the jury had attempted to do was to find liability in favor of Teton Springs but still leave the Hargers with no out of pocket losses is belied by the fact that the verdict form provided the jury with exactly this opportunity – and they chose not to take it. The jury's verdict indicates that the jury clearly found in favor of the Hargers, but, disregarding the undisputed evidence regarding the measure and amount of the Hargers' damages, calculated instead what it deemed to be an adequate rate of return on the deposit as its compensation for the breach. The actions of the jury, while unquestionably wrong, do not give rise to the suggestion of a compromise verdict.

In light of the undisputed evidence demonstrating the extent of the Hargers' breach of contract damages and the absence of any indication of the jury's failure to determine liability in this case, the district court abused its discretion in not considering and applying the *Liepert* test to the Harger's request for an additur and/or new trial on the issues of damages only.

IV. ATTORNEY'S FEES

The Hargers respectfully submit that they are entitled to a reasonable attorney fee on appeal pursuant to Idaho Code Section 12-120(3); *Erickson v. Flynn*, 138 Idaho 430, 64 P.3d 959 (Ct. App. 2002). Respondent also requests an award of costs based on Idaho Appellate Rule 40.

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[13] Footnote 2 in Appendix, Tab 1.

V. CONCLUSION

Prejudicial error has crept into this record such that substantive justice has not been done. The district court correctly ordered a new trial in this case pursuant to Idaho Rule of Civil Procedure 59 and *Pierstorff v. Gray's Auto Shop,* 58 Idaho 438, 447, 74 P.2d 171, 175 (1937), as the appropriate remedy for the jury's obvious and capricious disregard of the undisputed evidence of the damages suffered by the Hargers as a result of Teton Springs' breach of their contract to purchase the lot and model cabin. For this reason, the order of the district court should be affirmed and remanded to the district court in accordance with the orders of this Court, or in the alternative, modified to include an additur and/or to limit the new trial to the issue of damage only.

DATED this 29th day of June, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Bradley J. Williams – Of the Firm
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2007, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served by the method indicated below, and addressed to the following:

Sean R. Moulton MOULTON LAW OFFICE 60 East Wallace POB 631 Driggs, ID 83422 Facsimile: 354-2346 *Attorney for Defendant/Appellant-Counter-Claimant/Cross-Respondent*	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (X) E-mail

Bradley J. Williams